BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	CC Docket No. 98-147

CENTENNIAL COMMUNICATIONS CORP.'S OPPOSITION TO JOINT PETITION FOR STAY PENDING JUDICIAL REVIEW

Centennial Communications Corp. ("Centennial") is a provider of Commercial Mobile Radio Services ("CMRS") in Puerto Rico, the U.S. Virgin Islands, and in various markets within the continental United States. Centennial also operates as a landline, fiber-based competitive local exchange carrier ("CLEC") in Puerto Rico.

While Centennial operates as both a CMRS provider and a landline CLEC, this pleading focuses on the ILECs' objection to, and request for a stay of, the Commission's decision in the *Triennial Review Order*[1] clarifying the rights of CMRS providers to obtain the interoffice transport UNE. *See* Joint Petition at 23-25.[2] Centennial believes that the

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[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking,* CC Docket Nos. 01-338 *et al.* (released August 21, 2003) ("*Triennial Review Order*").

[2] Joint Petition for Stay Pending Judicial Review ("*Joint Petition*"), filed by BellSouth, Qwest, USTA, SBC, and Verizon on September 4, 2003.

ILECs' entire Petition is without merit. However, their discussion of the CMRS issue is particularly flawed.

In the relevant portions of the *Triennial Review Order,* the Commission decided that it would significantly ***limit*** the scope of the interoffice transport UNE, as compared to what exists today and as compared to what various competitors, including CMRS providers, had sought. Specifically, while the Commission originally included connections between ILEC switches and competitor switches within the definition of the UNE, in the *Triennial Review Order* the Commission concludes, essentially, that the UNE only embraces connections between an ILEC's own switches. *Triennial Review Order* at ¶¶ 365-369. But in the course of significantly ***cutting back*** on the obligation of ILECs to provide transport at UNE rates, the Commission simultaneously noted — reasonably enough — that the newly-narrowed UNE would be available to CMRS carriers along with any other type of competitor. *Id.* at ¶ 368.

The ILECs object to this because it might, conceivably, in some circumstances, "allow CMRS providers to connect their [switches] to their cell sites or to interexchange carrier ('IXC') points of presence ('POPs') through the use of ILEC transport when the ILEC network would otherwise have nothing to do with that connection." Joint Petition at 24. This is, supposedly, a "new" requirement. *Id.* Because of alleged problems with the Commission's "impairment" analysis, this "new" requirement should, supposedly, be stayed. *Id.* at 24-25.

This argument is fundamentally flawed because it misunderstands what the Commission has done. The ILECs' concern about CMRS providers using the interoffice transport UNE would only make sense if CMRS providers would not have been entitled

to use that UNE under the rule that the *Triennial Review Order* is changing. If CMRS providers were entitled to use the interoffice transport UNE under the old rule, then the ILECs cannot be not complaining about something the Commission ***did*** — supposedly, making the interoffice transport UNE "newly" available to CMRS providers — but, rather, about something the Commission ***did not do*** — *viz.,* restricting the availability of the interoffice transport UNE ***even more*** than it chose to do.[3]

In fact — while ILECs may have resisted this conclusion — under Section 251(c)(3), UNEs are to be made available to "any requesting telecommunications carrier for the provision of a telecommunications service." It follows that under the old definition of the interoffice transport UNE, CMRS providers — like plain old landline CLECs — were entitled to obtain UNE connections between and among ILEC switches, and connections between the ILEC network and the CMRS provider's network. What the Commission did here was ***scale back*** the scope of the interoffice transport UNE. In mentioning CMRS providers, all the Commission was saying was that those providers would not be subject to ***even more onerous*** cutbacks in their access to the interoffice transport UNE than other "requesting telecommunications carriers." There is, therefore

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[3] Centennial admits to being somewhat mystified by the supposed significance the ILECs attach to the fact that CMRS providers might make use of the UNE in circumstances "when the ILEC network would otherwise have nothing to do with that connection." The key statutory provision, Section 251(c)(3), makes UNEs available to "any requesting telecommunications carrier" for use in offering "a telecommunications service." The main controversy underlying the *Triennial Review Order* has to do with how that broad language is qualified by the requirement in Section 251(d)(2)(B) that UNEs only be available after some appropriate showing of "impairment." Neither of these provisions suggests or implies that there must be some particular relationship between "the ILEC network" and "the connection" that the requesting telecommunications carrier will establish with the UNEs it purchases, in the course of providing the "telecommunications service" that the UNE will be used to provide.

no new Commission requirement — no expansion of CMRS provider rights — to be stayed.[4]

As a result, what the ILECs are really asking for here is not a "stay" at all, but, instead, a new, emergency order ***restricting CMRS providers' UNE rights even more than the Commission just did.*** There is no conceivable factual or legal basis for the issuance of such an order.[5]

But put aside the fact that, with regard to CMRS providers, the ILECs aren't seeking a "stay" at all. Even on its own terms, the ILECs' stay motion is fatally flawed, in two key respects.

First, the ILECs are a bit deranged in their ability to ignore the fact that, nearly eight years after the passage of the Act, they remain the overwhelmingly dominant provider of essentially all non-toll landline telecommunications services, everywhere in the country. They dominate the provision of telephone exchange services to businesses. They dominate the provision of telephone exchange services to residential customers.

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[4] To the extent that the Commission had not previously clearly and explicitly stated that CMRS carriers were as entitled as any other "requesting telecommunications carrier" to access to UNEs under its pre-Triennial-Review rules, the *Triennial Review Order* provided an opportunity for such clarification. In this regard, had the Commission viewed itself to be in any way ***expanding*** the scope of CMRS providers' UNE rights in the *Triennial Review Order,* it would surely have said so. The fact that it did not only confirms that no actual legal "expansion" of such rights has occurred. The Commission's ***clarification*** of the scope of its UNE rules (both old and new) may indeed undercut the ILECs' ability to keep a straight face when trying to deny UNE requests from CMRS providers, but that is not a legally cognizable change in circumstances that could be "stayed" from taking effect.

[5] If, as the ILECs threaten, they next present their "stay" request to the Court of Appeals, they will confront the same problem. With respect to CMRS providers' access to the interoffice transport UNE, the ILECs don't want to "stay" something that the Commission supposedly just did. Instead, they will be looking for a mandatory injunction directing the Commission to cut back on CRMS provider UNE rights not only more than the Commission did but, necessarily, more severely than the Commission has cut back on the UNE rights of plain old landline CLECs. Nothing the ILECs have presented (or could, in Centennial's view, conceivably present) would justify such blatant discrimination against a particular class of competitors.

They dominate the provision of switched access to IXCs. They dominate the provision of special access to IXCs at wholesale. They dominate the provision of special access to end users at retail (the service formerly known as "private lines"). And — while the retail CMRS market is certainly more competitive than landline markets — the fact is that the major ILEC-affiliated CMRS providers, Verizon Wireless and Cingular Wireless, are both huge players in that market as well.

In these circumstances, whatever the twists and turns of a judicially-approved "impairment" analysis turn out to be, in the real world the key purpose of the 1996 Act — promoting competition in all telecommunications markets, especially the historically monopolized telephone exchange service and exchange access markets — remains unfulfilled. When the Commission does something that makes it ***easier*** for competing carriers to operate and to expand, we know that that alone, without more, ***serves the public interest.*** Indeed, it serves the key public interest underlying the Act. The ILECs' requested stay, therefore, would necessarily harm the public interest, and can and should be denied on that basis alone.[6]

Second, even assuming that the obligation to make the interoffice transport UNE available to CMRS providers is something "new" — which it is not — the ILECs cannot, as a matter of law, show that they are cognizably "harmed" at all, much less irreparably harmed, by being required to do so.

Cutting through their overblown rhetoric, the ILECs are complaining here about one simple thing: price. They admit — indeed, they rely upon the fact — that they are

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[6] *See Verizon Communications v. FCC,* 535 U.S. 467, 502 n.20 (2001) ("rules stressing low wholesale prices are by no means inconsistent with the deregulatory and competitive purposes of the Act").

already required to provide the same transport functionality for CMRS providers (or anyone else, for that matter) under the terms of their special access tariffs.[7] So the issue here is not, and cannot be, ***providing transport*** to CMRS providers. The ILECs just don't want to have to do so at the TELRIC rates that apply to UNEs, as opposed to the fully distributed cost rates that generally apply to their access tariffs.

In the context of irreparable harm, however, the ILECs lost this battle two years ago in the Supreme Court. The ILECs had challenged the entire TELRIC ratemaking methodology on the grounds (among others) that it would necessarily unconstitutionally "confiscate" their property in violation of the 5th Amendment. They lost. The Court ruled that — while it is of course possible that some state might mistakenly establish a confiscatory rate in some specific case — there is nothing inherently confiscatory about the TELRIC methodology. *Verizon Communications v. FCC,* 535 U.S. 467, 522-28 (2001).

This means that (again, in the absence of some specific showing that some specific TELRIC-based rate was established too low, in error) in traditional ratemaking terms, a TELRIC-based rate is a "reasonable" rate. More specifically, traditional ratemaking recognizes that regulated rates probably can never be set at some theoretically perfect, correct, "right" level. Instead, all that can reasonably be required of regulators is that they set rates that fall within a (usually broad) "zone of reasonableness," a zone that

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[7] Joint Petition at 24 ("CMRS providers have used their own facilities ***or special access services*** to accomplish that end"). Presumably the "own facilities" the ILECs are referring to are microwave backhaul links. These, however, represent only a trivial portion of total backhaul capability. *See Triennial Review Order* at ¶ 367 & n. 1123 (only 4% of AT&T Wireless backhaul provided by microwave, which is subject to various restrictions and reliability concerns). Because these types of facilities are "not common," *id.,* in fact the transport at issue, if not provided via UNEs, is provided via special access.

runs from "confiscatory" rates at the low end to "exorbitant" rates at the high end.[8] TELRIC-based rates fall within this zone because (again, putting aside some specific mistake in setting some specific rate) they are not confiscatory.[9] As the Supreme Court succinctly put it: "any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory." *Permian Basin Area Rate Cases,* 390 U.S. 747, 767 (1968). Even assuming that a TELRIC-based rate for the interoffice transport UNE is the lowest reasonable rate, the very fact that the rate is "reasonable" in traditional ratemaking parlance proves that the rate is not "confiscatory."[10]

Now, every firm faced with a regulatory constraint on its ability to raise its rates will, in every case, prefer a higher rate within the zone of reasonableness to a lower one. But it has never been held to be irreparable injury for purposes of a stay — indeed, it has never been held to be cognizable "injury" at all — for a regulated firm to be required to charge a rate for its services that falls within the zone of reasonableness but that is nonetheless lower than the regulated firm wants. Rates that fall within the zone of

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[8] *See, e.g., Washington Gas Light Co. v. Baker,* 188 F.2d 11 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 952, (1951); *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Area Transit Commission,* 842 F.2d 402, 426 & n.9 (D.C. Cir. 1988).

[9] *Verizon Communications v. FCC, supra,* 535 U.S. at 522-28 (rejecting challenge to TELRIC-based rates as either confiscatory in general or presenting a serious likelihood of being confiscatory).

[10] "By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is ***not confiscatory*** in the constitutional sense." *Jersey Central Power & Light Co. v. FERC,* 768 F.2d 1500, 1507 (D.C. Cir. 1985) (emphasis added). Again, this is not to say that no state regulator will ever make a mistake and establish a confiscatory rate while purportedly applying the TELRIC methodology. But regulators have made mistakes and imposed confiscatory rates while purportedly applying many different ratemaking methodologies. Here, after the Supreme Court has expressly rejected the claim that the TELRIC methodology will necessarily produce confiscatory rates or can reasonably be expected to do so, the only legally permissible presumption is that TELRIC-based rates for the interoffice transport UNE are ***not*** confiscatory.

reasonableness are ***legal,*** and regulatory bodies such as the Commission do not "injure" a regulated firm by requiring such rates to be charged.[11]

It follows that even if the ILECs are right in their assertion that making the interoffice transport UNE available to CMRS providers is something "new"; and even if the Commission is absolutely, totally wrong in its analysis of the interoffice transport UNE; and absolutely, totally wrong in its analysis of whether CMRS carriers or anyone else is "impaired" without access to that UNE; and even if the Commission is acting utterly outside the bounds of what Congress intended with respect to the implementation of the 1996 Act — even if all that were true, which, of course, it isn't — the only "bad" thing that's happening to the ILECs here is that while this matter is on appeal, they will have to make some services available to CMRS carriers at a somewhat lower ***reasonable*** rate than they would otherwise be permitted to charge. As a matter of law, that is not "injury" at all, much less "irreparable" injury. As a result, that purported "injury" cannot support a stay pending appeal.

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[11] In this regard, *Permian Basin* itself reaffirmed that a stay of an administrative rate order is not appropriate without a showing of "irreparable" injury. *Permian Basin,* 390 U.S. at 773 (referring to the "the established rule that a party is not ordinarily granted a stay of an administrative order without an appropriate showing of irreparable injury"). State-level decisions confirm that without a showing that a rate order imposes a confiscatory rate, a stay is inappropriate. *See, e.g., Utah Power & Light Co. v. Utah Public Utilities Commission,* 107 Idaho 47; 685 P.2d 276 (1984) (stay inappropriate without a showing of "probable confiscation"); *In Re Brooklyn Union Gas Co.,* 242 A.D. 718, 273 N.Y.S. 428 (A.D. 1934) (statutory term "great and irreparable loss" used to express standard for granted stay "means confiscation").

For all the foregoing reasons, the Commission should deny the ILECs' Joint Petition to the extent it seeks to "stay" the Commission's ruling with respect to the availability of the interoffice transport UNE to CMRS providers.

Respectfully submitted,

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September 11, 2003

CERTIFICATE OF SERVICE

I, Marlene E. Shoemaker, hereby certify that on this 11th day of September, the foregoing Centennial Communications Corp.'s Opposition to "Joint Petition for Stay Pending Judicial Review" was filed electronically on the Commission's ECFS in accordance with the Commission's rules and copies were served by the method indicated below on the following:

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